

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CITY OF SYRACUSE, NY, et al.,	:	
	:	No. 1:20-CV-06885-GHW
Plaintiffs,	:	
	:	
v.	:	
	:	
BUREAU OF ALCOHOL, TOBACCO,	:	
FIREARMS AND EXPLOSIVES, et al.,	:	
	:	
Defendants.	:	
-----X	:	

PLAINTIFFS' LOCAL RULE 56.1 STATEMENT

Pursuant to Local Rule 56.1 of the U.S. District Court for the Southern District of New York, Plaintiffs submit in support of their motion for summary judgment the following statement of material facts as to which there is no genuine issue to be tried:

I. Introduction

1. The full certified administrative record before the Court in this case has been filed by the Defendants at Docket #60 and is bates-stamped ATF0001-0780. Plaintiffs rely on the entirety of that administrative record in their motion for summary judgment, with particular reliance on the specific documents within the administrative record that are cited in Plaintiffs' Memorandum of Law in support of their motion. Limited portions of the administrative record are cited herein to provide context to other undisputed facts that are not part of that record. Citations herein to the administrative record are denominated: ATFXXXX. Citations to the Declaration of Aaron Esty in support of Plaintiffs' Motion for Summary Judgment are denominated: Esty Decl. ¶ __. Citations to additional declarations, which are submitted as Exs.

25 to 34 of the Esty Declaration, are cited by direct reference to those additional declarations as well as the corresponding Esty Declaration exhibit number (*e.g.*, Suplina Decl., ¶ __ (attached as Esty Decl. Ex. 30)).

II. Background and Undisputed Facts Relating to the Polymer80 Determination Letters and the Petition for Rulemaking

2. The key part or core component of any completed, functional firearm is the frame or receiver. “*Unfinished Lower Receivers*” Bulletin ATF0296-0303 at ATF0298; Bisbee Decl., ¶22 (attached as Esty Decl. Ex. 33); *see generally* ATF Technical Bulletin 14-01 ATF0284-0289.

3. The Gun Control Act of 1968 (“GCA”) defines “firearm” in pertinent part as follows: “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon....” 18 U.S.C. § 921(a)(3).

4. “Ghost gun” is a term commonly used by law enforcement and others to refer to a firearm that (a) started off as an unfinished lower receiver or frame purchased in a kit or separately along with other necessary parts, and (b) was assembled by the purchaser into a completed and functional firearm that has no serial number. “*Unfinished Lower Receivers*” Bulletin ATF0296-0303 at ATF0301; *see also* Everytown Petition for Rulemaking (“Petition”) ATF0366-0388 at ATF0368. (The term “ghost gun” as used herein references such firearms.)

5. Within the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), the Firearms and Ammunition Technology Division “is the federal government’s technical authority on the determinations of firearms and ammunition under federal rules and regulations.” ATF Fact Sheet Esty Decl. ¶4 (Ex. 2).

6. Within the FATD, the Firearms Technology Industry Services Branch (“FTISB”), formerly the Firearms Technology Branch (“FTB”), “is responsible for providing firearm

industry-related technical support regarding firearms laws, regulations, and technology issues.”

ATF Fact Sheet Esty Decl. ¶4 (Ex. 2.)

7. In their first 4 causes of action, Plaintiffs challenge:

- a. a 2015 Interpretive Ruling, which includes Ruling 2015-1 at ATF0290-0295 and related ATF website Q&As at ATF0363-0365; and,
- b. three determination letters issued by ATF, acting through FTISB/FTB, to online ghost gun seller Polymer80: the February 18, 2015 letter, ATF0225-0228, the November 2, 2015 letter, ATF0229-0247, and the January 18, 2017 letter, ATF0253-0259.

8. Polymer80 has posted and currently posts all three of these ATF determination letters on its website and has used the letters to represent to its customers that purchasing its unfinished frames and receivers and kits is legal. Esty Decl. ¶¶ 12, 13 (Exs. 9, 10).

9. Eight days after receiving the January 18, 2017 ATF determination letter, Polymer80 posted that letter to its Facebook page and began taking orders for the PF940C Glock frame that ATF had determined in that letter was not a firearm. Esty Decl. ¶ 14 (Ex. 11).

10. To this day, Polymer80 continues to sell or offer for sale the same or substantially similar frames and receivers as referenced in the above-described ATF determination letters, Esty Decl. ¶15 (Ex. 12), as do other online distributors of Polymer80 products, Esty Decl. ¶16 Ex. 13).

11. In addition to Polymer80, numerous sellers of unfinished frames and receivers and gun-building kits feature ATF determination letters on their websites, Esty Decl. ¶17 (Ex. 14), and several sellers link to copies of the ATF letters sent to Polymer80, Esty Decl. ¶16 (Ex. 13).

12. Polymer80 pistol frames are stamped with a “P80” insignia on the lower portion of the grip. Esty Decl. ¶ 14 (Ex. 11); McFarlin Decl., ¶18 (attached as Esty Decl. Ex. 34).

13. Plaintiffs Everytown for Gun Safety Action Fund and Everytown for Gun Safety Support Fund (collectively “Everytown”) submitted a Petition for Rulemaking to Defendants ATF and United States Department of Justice (“DOJ”) dated December 11, 2019 (the “*Petition*”). *Petition* ATF0366-0388. The Petition urged these agencies to promptly engage in rulemaking to regulate unfinished frames and receivers. *Petition* at ATF0366.

14. Receipt of the *Petition* was acknowledged in a letter from the Department of Justice dated December 2019. Esty Decl. ¶6 (Ex. 4).

15. On April 30, 2020, Everytown sent a follow-up letter urging ATF and DOJ to respond to the *Petition*. Esty Decl. ¶6 (Ex. 4).

16. Each of Plaintiff Cities joined the *Petition* in a letter/petition to Defendants ATF and DOJ in July and August 2020. *Owens Decl.*, ¶30 (attached as Esty Decl. Ex. 25); *Syracuse Letter* ATF0403-0405; *Hines Decl.*, ¶28 (attached as Esty Decl. Ex. 29); *Columbia letter* at ATF0392-0395; *Tran Decl.*, ¶30 (attached as Esty Decl. Ex. 26); *San José Letter* at ATF0406-0408; *Weis Decl.*, ¶18 (attached as Esty Decl. Ex. 27); *Chicago letter* at ATF0396-0398.

17. As of the date of this filing, ATF has not responded to the *Petition* or to any of the Plaintiff cities who wrote to join it. *Suplina Decl.*, at ¶14 (attached as Esty Decl. Ex. 30); *Hines Decl.*, ¶28 (attached as Esty Decl. Ex. 29); *Tran Decl.*, ¶29 (attached as Esty Decl. Ex. 26); *Weis Decl.*, ¶18 (attached as Esty Decl. Ex. 27); *Owens Decl.*, ¶30 (attached as Esty Decl. Ex. 25).

III. Undisputed Facts Relating to Plaintiff Cities

18. Over the past few years, Plaintiff cities have experienced increasing rates of ghost guns being recovered by law enforcement in connection with crimes. *Owens Decl.*, ¶¶10-14 (attached as Esty Decl. Ex. 25); *Tran Decl.*, ¶¶9-14 (attached as Esty Decl. Ex. 26); *Deenihan Decl.*, ¶¶7, 8, 9 (attached as Esty Decl. Ex. 28); *see also Hines Decl.*, ¶¶11, 12, 21 (attached as Esty Decl. Ex. 29).

19. Unserialized ghost guns are especially attractive to criminals. “*Unfinished Lower Receivers*” Bulletin ATF0296-0303 at ATF0298; *Owens Decl.*, ¶23 (attached as Esty Decl. Ex. 25); *Bisbee Decl.*, ¶¶17, 18 (attached as Esty Decl. Ex. 33); Esty Decl. ¶18 (Ex. 15 at 9).

20. Because ghost guns have no serial numbers, they are more difficult for law enforcement in Plaintiff cities to investigate when recovered in connection to criminal activity. *Owens Decl.*, ¶¶20-22 (attached as Esty Decl. Ex. 25); *Tran Decl.*, ¶¶19-22 (attached as Esty Decl. Ex. 26); *Deenihan Decl.* at ¶10, 11 (attached as Esty Decl. Ex. 28); *Hines Decl.*, ¶¶17-20 (attached as Esty Decl. Ex. 29); *Bisbee Decl.*, ¶¶17-19 (attached as Esty Decl. Ex. 33).

21. Plaintiff cities incur substantial costs in connection with responding to shootings and other firearms-related crimes, including crimes involving serialized and unserialized firearms; these costs include police and emergency services costs. *Owens Decl.*, ¶¶17-22 (attached as Esty Decl. Ex. 25); *Tran Decl.*, ¶¶15-22 (attached as Esty Decl. Ex. 26); *Weis Decl.* at ¶¶10-12 (attached as Esty Decl. Ex. 27); *Hines Decl.*, ¶¶13-16 (attached as Esty Decl. Ex. 29); *Miller Decl.*, ¶¶5, 6 (attached as Esty Decl. Ex. 32).

22. Ghost gun investigations by law enforcement in Plaintiff cities often require more city resources and expenditures compared to investigations of guns that are serialized. *Owens Decl.*, ¶¶19-22 (attached as Esty Decl. Ex. 25); *Tran Decl.*, ¶¶18-22 (attached as Esty Decl. Ex.

26); *Deenihan Decl.* ¶¶10-12 (attached as Esty Decl. Ex. 28); *Hines Decl.*, ¶¶17-19 (attached as Esty Decl. Ex. 29).

23. In many cases, because of the absence of a serial number, law enforcement in Plaintiff cities is unable to determine the source of a gun and/or solve a crime that has been committed with a ghost gun. *Owens Decl.*, ¶¶19-22 (attached as Esty Decl. Ex. 25); *Tran Decl.*, ¶¶18-22 (attached as Esty Decl. Ex. 26); *Deenihan Decl.* ¶¶10-12 (attached as Esty Decl. Ex. 28); *Hines Decl.*, ¶¶17-19 (attached as Esty Decl. Ex. 29).

24. Increasing numbers of ghost guns being used in connection with crimes in Plaintiff cities undermines the ability of law enforcement in these cities to investigate and prosecute ghost gun crimes, determine the original source(s) of ghost guns, and prevent future gun crimes. *Owens Decl.*, ¶¶19-22 (attached as Esty Decl. Ex. 25); *Tran Decl.*, ¶¶18-24 (attached as Esty Decl. Ex. 26); *Deenihan Decl.* ¶¶10-12 (attached as Esty Decl. Ex. 28); *Hines Decl.*, ¶¶17-19 (attached as Esty Decl. Ex. 29).

City of Syracuse

25. In 2018, the Syracuse Police Department recovered 7 ghost guns. In 2019, the Syracuse P.D. recovered 19 ghost guns. Five of the guns recovered in 2018 and 2019 are linked to shootings with injuries. *Owens Decl.*, ¶10 (attached as Esty Decl. Ex. 25).

26. In 2020, the Syracuse P.D. has recovered 33 ghost guns, including two linked to shootings with injuries. *Owens Decl.*, ¶11 (attached as Esty Decl. Ex. 25).

27. Of the 59 ghost guns recovered in the City of Syracuse since 2018, at least 53 of them were Polymer80s. *Owens Decl.*, ¶12 (attached as Esty Decl. Ex. 25).

City of San José

28. According to the Santa Clara County Crime Lab, the San José Police Department (“SJPD”) seized 142 ghost guns during criminal investigations between January 2015 and April 2020. Nine of these 142 were recovered during homicide investigations. Many of these ghost guns were in the possession of convicted felons, drug addicts, known gang members, minors, or those who otherwise would be prohibited from owning or possessing firearms. *Tran Decl.*, ¶9 (attached as Esty Decl. Ex. 26).

29. In 2019, SJPD seized 65 ghost guns during criminal investigations. Of these, at least 12 were made from kits manufactured by the company Polymer80. *Tran Decl.*, ¶10 (attached as Esty Decl. Ex. 26).

30. The many ghost guns, including Polymer80s, that have been recovered in connection to several criminal matters in San José include cases involving homicides, burglaries, armed robberies, receiving stolen property, felon-in-possession of firearms, and making criminal threats. *Tran Decl.*, ¶11 (attached as Esty Decl. Ex. 26).

31. In 2019 alone, the City of San Jose spent an estimated \$448,092.54 responding to and investigating 65 calls involving ghost guns. *Tran Decl.*, ¶17 (attached as Esty Decl. Ex. 26).

32. From 2018-2020, SJPD’s Burglary Prevention Unit has had six proactive investigations into suspects that were selling and/or manufacturing ghost guns. The SJPD estimates it has expended roughly 6,000 hours of manpower investigating these cases and spent an estimated \$788,781.20 in total investigating all six cases. *Tran Decl.*, ¶22 (attached as Esty Decl. Ex. 26).

City of Chicago

33. In 2016, the City of Chicago Police Department recovered just 2 ghost guns. In 2017, the Chicago P.D. recovered 10 ghost guns. In 2018, Chicago P.D. recovered 21 ghost guns. In 2019, Chicago P.D. recovered 72 ghost guns. And in 2020, Chicago P.D. has recovered 92 ghost guns through October 31. *Deenihan Decl.* ¶7 (attached as Esty Decl. Ex. 28).

34. In 2019, at least three Polymer80 firearms were involved in shooting incidents in Chicago. Of these 3 known Polymer80s, all were Glock-type pistols. *Deenihan Decl.* ¶8 (attached as Esty Decl. Ex. 28).

35. In 2020 to date, five Polymer80 firearms were involved in shooting incidents in Chicago. Of these 5 Polymer80s, all were Glock-type pistols. *Deenihan Decl.* ¶9 (attached as Esty Decl. Ex. 28).

City of Columbia

36. From 2015-2019, the Columbia, South Carolina Police Department (“CPD”) seized 64 firearms with no serial number listed on their record and eight firearms with no serial number and no make identified in the record. *Hines Decl.*, ¶11 (attached as Esty Decl. Ex. 29).

37. In 2019, under CPD case# 19002286, a Polymer 80 PF940C 9mm pistol was seized. This was one of the 64 guns mentioned above with no serial number associated with its record. *Hines Decl.*, ¶12 (attached as Esty Decl. Ex. 29).

IV. Undisputed Facts Related to Plaintiff Everytown

38. Everytown for Gun Safety Action Fund (“Everytown Action Fund”) is a nonprofit membership corporation and the country’s largest gun violence prevention organization. Everytown for Gun Safety Support Fund (“Everytown Support Fund,” and, together with

Everytown Action Fund, “Everytown”) is the education, research, and litigation arm of Everytown Action Fund. Suplina Decl., ¶¶5, 6 (attached as Esty Decl. Ex. 30).

39. A central component of Everytown’s core mission is to advocate for common-sense gun safety laws, reforms, and initiatives at the state, local and national levels. Many of these efforts assume the existence and rely upon the enforcement of the federal Gun Control Act of 1968 (the “GCA”) as a foundational framework for Everytown’s advocacy work. Suplina Decl., ¶¶16-21 (attached as Esty Decl. Ex. 30).

40. Because of ATF’s failure to enforce the GCA and regulate ghost guns, Everytown’s core mission is undermined and Everytown was forced to divert significant resources from that core mission. Suplina Decl., ¶¶8-14 (attached as Esty Decl. Ex. 30).

41. Those diverted resources, which would have been spent on other identified work that is part of Everytown’s core mission, include employee time used to file the Petition for Rulemaking (the first and only such Petition Everytown has ever filed), engage in public education efforts including preparation of a lengthy report on the growing threat of ghost guns, and commence and prosecute a lawsuit when ATF failed to respond to the Petition. Suplina Decl., ¶¶8-14 (attached as Esty Decl. Ex. 30).

V. Undisputed Statements by ATF and Law Enforcement Relating to Ghost Guns

42. In 2019-2020, ATF officials and other law enforcement officials around the country have made public statements about the growing number of ghost guns being recovered in connection with criminal investigations. Esty Decl. ¶¶7, 8 (Exs. 5, 6).

43. Former ATF Acting Director Thomas Brandon stated on national television, during a 60 Minutes broadcast that aired in May 2020, that he was prepared to recommend that ATF should reclassify ghost gun kits as firearms to protect public safety. Brandon stated that “as

the head of the agency at the time-- I said, 'I'm gonna do everything I can for public safety with my team.' If you wanted to buy a kit and make your own gun, it's just gonna hav-- [sic] have a serial number on it." Esty Decl. ¶7 (Ex. 5).

VI. Additional Undisputed Facts Related to Standing and Unreasonable Agency Delay in Responding to the Petition for Rulemaking

44. Since 2018, ghost guns have been used in numerous shootings—including multiple murders—and have been recovered in connection with numerous crimes.

- a. For example, in November 2019, at Saugus High School in Santa Clarita, California, a 16-year-old student used a ghost gun to shoot two students dead and wound three others. Esty Decl. ¶7; *Tretta Decl.* ¶¶2, 5-11 (attached as Esty Decl. Ex 31). One of the wounded students who survived is Plaintiff Everytown Action Fund member Mia Page-Tretta, who was 16 years old when she was shot. *Tretta Decl.* ¶¶1,2 (attached as Esty Decl. Ex 31).
- b. In May 2020, a man identified as being linked to the “Boogaloo” movement used an AR-15 style rifle which an ATF examination revealed to be a “Privately Made Firearm” to shoot two Protective Security Officers, one fatally, at the federal courthouse in Oakland, California. Eight days later, the man murdered a sheriff’s deputy in Santa Cruz, California, then used the AR-15 to carjack a car, before being arrested. Esty Decl. ¶10 (Ex. 8 at ¶32).
- c. Official court filings show numerous other shootings and other crimes during which ghost guns were used and/or recovered since 2018, Esty Decl. ¶11, including multiple recoveries of Polymer80 ghost guns, *id.*

45. Prior to 2015, the Washington D.C. Metropolitan Police Department (“MPD”) had never recovered a ghost gun in the District of Columbia. In 2017, MPD recovered three

ghost guns. In 2018, that number rose to 25, and then rose to 116 in 2019. Three of the ghost guns recovered in 2019 were involved in murders. As of May 29, 2020, MPD has recovered 106 ghost guns. Esty Decl. ¶9 (Ex. 7 at ¶¶ 32-33).

46. Of the 250 ghost guns recovered by Washington, D.C. police from 2017 through May 2020, over 80% were manufactured by Polymer80. Esty Decl. ¶ 9 (Ex. 7 at ¶34).

47. There are at least 80 online sellers of unfinished frames, receivers, and/or gun-building kits. Esty Decl. ¶19 (Ex. 16); *Petition*, ATF 0366-0388 at ATF0371-0375.

48. Many online sellers of unfinished frames and receivers or gun-building kits draw attention to ATF’s decision not to regulate “80 percent” frames and receivers. Esty Decl. ¶20 (Ex. 17). Some sellers’ websites link directly to ATF’s Q&As on receiver blanks. *Id.*

49. Through a single website, a person can purchase everything from an unfinished AR-15 lower receiver that can be finished into a semi-automatic rifle; to an unfinished pistol frame that can be turned into a ready-to-use handgun; to complete “kits” that include every part needed to make a functioning firearm. *Petition*, ATF0366-0388 at ATF0378. Esty Decl. ¶21 (Ex. 18).

50. Unfinished frames and receivers are often marketed as “80%” complete, suggesting that a buyer needs to do only 20 percent of the work for the frame or receiver to be assembled into an operable firearm. “*Unfinished Lower Receivers*” *Bulletin*, ATF0296-0303 at ATF0299; *Petition* ATF0366-0388 at ATF0374-0375. Esty Decl. ¶22 (Ex. 19).

51. For example, Polymer80—a leading supplier of ghost gun frames, receivers and kits, whose name includes the “80%” concept—offers “Buy Build Shoot™ kits,” Esty Decl. at ¶23 (Ex. 20), as well as instructional manuals and videos for easily completing assembly. *Id.*

52. Many sellers not only provide all of the parts to construct a fully operational firearm, but frequently offer a jig as well. Esty Decl. at ¶24 (Ex. 21). A jig is a device that fits around a frame or receiver and guides the drilling and milling necessary to finish the unfinished frame or receiver so that it is ready to be assembled into a functioning firearm. Sellers also often offer the exact drill bits necessary to finish a frame or receiver. Petition ATF0366-0388 at ATF0374. Esty Decl. ¶25 (Ex. 22).

53. A Polymer80 Glock-type handgun kit—which includes an unfinished frame, a jig, drill bits, and other parts—can be turned into an operable firearm in 86 minutes. McFarlin Decl. ¶¶13-19 (attached as Esty Decl. Ex. 34).

54. Numerous websites emphasize and highlight the ease and speed with which unfinished frames and receivers can be turned into operable firearms. Esty Decl. ¶26 (Ex. 23).

55. Many of these websites include or link to instructional materials and videos showing how easy it is to convert the unfinished frames and receivers into working weapons. Such videos are also readily available online. Petition ATF 0366-0388 at ATF0374-0375; Esty Decl. ¶27 (Ex. 24).

56. Currently, many federally licensed dealers across the country sell serialized lower receivers for those who wish to build their own firearms, and background checks are conducted on these sales. *Petition*, ATF 0366-0388 at ATF0387-0388; McFarlin Decl. ¶7 (attached as Esty Decl. Ex. 34).

57. According to Defendant U.S. Department of Justice, since its inception, the FBI NICS firearm background check system has denied and blocked over 1.7 million prospective purchasers from acquiring a firearm. The most common reason for denials is a felony conviction. Esty Decl. ¶38.

58. In a semiautomatic pistol such as a Glock 17, the frame is the lower portion of the firearm that contains the magazine well and houses the trigger. The frame provides the foundation for the slide and barrel, parts that allow a bullet to be expelled and the shell casing to be ejected. In an AR-15 style semiautomatic rifle, the lower receiver contains the magazine well and houses the trigger. The barrel attaches to the upper receiver which also contains the bolt carrier. The upper receiver attaches to the lower receiver via the pivot pin and takedown pin. *Bisbee Decl.* ¶22 (attached as Esty Decl. Ex. 33).

59. In 2015, ATF posted on its official website “QandAs” on “Receiver Blanks,” including pages titled “Can functioning firearms made from receiver blanks be traced?”, “Are ‘80%’ or ‘unfinished’ receivers illegal?”, and “Are there restrictions on who can purchase receiver blanks? [sic].” ATF0363-65; Esty Decl. ¶39.

Respectfully Submitted,

EVERYTOWN LAW

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